SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 468.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JOSEPH L. SCHIDER, TRADING AS "JOS. L. SCHIDER & CO."

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the District Court of the United States for the Southern District of New York, greeting:

Because in the record of proceedings, as also in the rendition of the order sustaining the demurrer which is in the said District Court of the United States for the Southern District of New York before you, or some of you, between the United States of America and Joseph L. Schider, trading as "Jos. L. Schider & Co.," a manifest error hath happened to the great damage of the said United States of America, as by its complaint appears; we being willing that such error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in its behalf, do command you that then under your seal distinctly and openly you send the records and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court at the city of Washington, together with this writ, so that you may have the same at the said place before the judges aforesaid on the 14th day of April, 1917, that the record and proceedings aforesaid being inspected, the said United States Supreme Court may cause further to be done therein to correct their error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, on the 16th day of March, in the year of our Lord one thousand nine hundred and seventeen.

[SEAL.] ALEX. GILCHRIST, Jr.,
Clerk of the District Court of the United States for the Southern District of New York.

The foregoing writ is hereby allowed.

LEARNED HAND.
U. S. District Judge, S. D. of N. Y.

2 UNITED STATES OF AMERICA, *Southern District of New York.* } *ss:*

I, Alex. Gilchrist, jr., clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from four to twenty-three, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of

United States of America, plaintiff in error,
against
Joseph L. Schider, trading as "Jos. L. Schider & Co.," defendant in error,

as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the Southern District

of New York, in the Second Circuit, this 21st day of March, in the year of our Lord one thousand nine hundred and seventeen, and of the independence of the United States the one hundred and forty-first.

[SEAL.] ALEX. GILCHRIST, Jr., *Clerk.*

3 (Indorsed:) C 9–308. U. S. District Court, Southern District of New York. United States of America, plaintiff, plaintiff in error, versus Joseph L. Schider, trading as "Jos. L. Schider & Co.," defendant. Writ of error. H. Snowden Marshall, United States attorney, attorney for U. S.

Filed Mar. 16, 1917, U. S. District Court, S. D. of N. Y.

4 INDICTMENT.

District Court of the United States of America for the Southern District of New York.

At a stated term of the District Court of the United States of America for the Southern District of New York, begun and held in the city and county of New York, within and for the district aforesaid, on the first Tuesday of February, in the year of our Lord one thousand nine hundred and seventeen, and continued by adjournment to and including the 14th day of February, in the year of our Lord one thousand nine hundred and seventeen.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The grand jurors of the United States of America, within and for the district aforesaid, on their oath present that Joseph L. Schider, trading as "Jos. L. Schider & Co.," late of the city and county of New York, in the district aforesaid, heretofore, to wit, on the twenty-fifth day of February, in the year of our Lord one thousand nine hundred and fourteen, at the Southern District of New York and within the jurisdiction of this court, did unlawfully deliver to the Old Dominion Steamship Company, a common carrier, for shipment from the city of New York, State of New York, in the district aforesaid, to the Continental Cider Company, in the city of Norfolk, State of Virginia, a certain article of food, contained in a bottle, which said bottle was the package in which the said article was offered for sale, and which was then and there plainly labelled as follows:

5 "Compound
Ess Grape

Jos. L. Schider & Co.
93–95 Maiden Lane, New York."

and the said article so contained in said bottle as aforesaid was then and there an imitation grape essence, artificially prepared from alcohol, water, and synthetically produced imitation essential oils, and contained no product of the grape, and contained no added poisonous

or deleterious ingredient, and the word "imitation" was not stated on the said bottle; that the said article of food so contained in said bottle as aforesaid, when delivered for shipment as aforesaid, was then and there unlawfully adulterated in that an imitation grape essence artificially prepared from alcohol, water, and synthetically produced imitation essential oils had been wholly substituted for a true grape product, which the article purported to be; against the peace of the United States and their dignity, and contrary to the form of the statute of the United States in such case made and provided. (Food & Drugs Act of June 30, 1906.)

Second count.

And the grand jurors aforesaid, on their oath aforesaid, do further present that Joseph L. Schider, trading as "Jos. L. Schider & Co.," late of the city and county of New York, in the district aforesaid, heretofore, to wit, on the twenty-fifth day of February, in the year of our Lord one thousand nine hundred and fourteen, at the Southern District of New York and within the jurisdiction of this court, did unlawfully deliver to the Old Dominion Steamship Company, a common carrier, for shipment from the city of New York, State of New York, in the district aforesaid, to the Continental
6 Cider Company, in the city of Norfolk, State of Virginia, a certain article of food, contained in a bottle, which said bottle was the package in which the said article was offered for sale, and which was then and there plainly labeled as follows:

"Compound
Ess Grape

Jos. L. Schider & Co.
93–95 Maiden Lane, New York."

and the said article, so contained in the said bottle as aforesaid, was then and there an imitation grape essence artificially prepared from alcohol, water, and synthetically produced imitation essential oils, and contained no product of the grape, and contained no added poisonous or deleterious ingredient, and the word "imitation" was not stated on the said bottle; that the said article of food so contained in the said bottle as aforesaid, when delivered for shipment, as aforesaid, was then and there unlawfully adulterated in that an imitation grape essence artificially prepared from alcohol, water, and synthetically produced imitation essential oils, had been mixed with the said article so as to reduce and lower and injuriously affect the quality and strength of the said article; against the peace of the United States and their dignity, and contrary to the form of the statute of the United States in such case made and provided. (Food & Drugs Act June 30, 1906.)

Third count.

And the grand jurors aforesaid, on their oath aforesaid, do further present that Joseph L. Schider, trading as "Jos. L. Schider & Co.," late of the city and county of New York, in the district aforesaid, heretofore, to wit, on the twenty-fifth day of February, in the
7 year of our Lord one thousand nine hundred and fourteen, at the Southern District of New York and within the jurisdiction of this court, did unlawfully deliver to the Old Dominion Steamship Company, a common carrier, for shipment from the city of New York, State of New York, in the district aforesaid, to the Continental Cider Company, in the city of Norfolk, State of Virginia, a certain article of food contained in a bottle, which said bottle was the package in which said article was offered for sale, and which was then and there plainly labeled as follows:

"Compound
Ess Grape

Jos. L. Schider & Co.
93–95 Maiden Lane, New York."

and the said article so contained in said bottle, as aforesaid, was then and there an imitation grape essence artificially prepared from alcohol, water, and synthetically produced imitation essential oils, and contained no product of the grape, and contained no added poisonous or deleterious ingredient, and the word "imitation" was not stated on the said bottle; that the said article of food so contained in said bottle as aforesaid, when delivered for shipment as aforesaid, was then and there misbranded, in that the statement "Ess Grape" appearing on the label regarding the said article and the ingredients and substances therein contained was false and misleading in that it indicated that the said article was a true product of the grape, whereas in truth and in fact the said article was not a true product of the grape, but was an inmitation grape essence arti-
8 ficially prepared from alcohol, water, and synthetically produced imitation essential oils, and contained no product of the grape; against the peace of the United States and their dignity, and contrary to the form of the statute of the United States in such case made and provided. (Food & Drugs Act of June 30, 1906.)

Fourth count.

And the grand jurors aforesaid, on their oath aforesaid, do further present that Joseph L. Schider, trading as "Jos. L. Schider & Co.," late of the city and county of New York, in the district aforesaid, heretofore, to wit, on the twenty-fifth day of February, in the year of our Lord one thousand nine hundred and fourteen, at the southern district of New York, and within the jurisdiction of this court, did unlawfully deliver to the Old Dominion Steamship Company, a common carrier, for shipment from the city of New

York, State of New York, in the district aforesaid, to the Continental Cider Company, in the city of Norfolk, State of Virginia, a certain article of food, contained in a bottle, which said bottle was the package in which said article was offered for sale, and which was then and there plainly labelled as follows:

"Compound
Ess Grape

Jos. L. Schider & Co.
93–95 Maiden Lane, New York."

and the said article so contained in the said bottle as aforesaid was then and there an imitation grape essence artificially prepared from alcohol, water, and synthetically produced imitation essential oils, and contained no product of the grape, and contained no added poisonous or deleterious ingredient, and the word "imitation" was not stated on the said bottle; that the said article of food so
9 contained in the said bottle as aforesaid, when delivered for shipment as aforesaid, was then and there misbranded in that it was labeled and branded so as to deceive and mislead the purchaser into the belief that the said article was a true product of the grape, whereas in truth and in fact the said article was not a true product of the grape, but was an imitation grape essence artificially prepared from alcohol, water, and synthetically produced imitation essential oils, and contained no product of the grape, against the peace of the United States and their dignity, and contrary to the form of the statute of the United States in such case made and provided. (Food and Drugs Act of June 30, 1906.)

Fifth count.

And the grand jurors aforesaid, on their oath aforesaid, do further present that Joseph L. Schider, trading as "Jos. L. Schider & Co.," late of the city and county of New York, in the district aforesaid, heretofore, to wit, on the twenty-fifth day of February in the year of our Lord one thousand nine hundred and fourteen, at the southern district of New York and within the jurisdiction of this court, did unlawfully deliver to the Old Dominion Steamship Company, a common carrier, for shipment from the city of New York, State of New York, in the district aforesaid, to the Continental Cider Company, in the city of Norfolk, State of Virginia, a certain article of food contained in a bottle, which said bottle was the package in which said article was offered for sale, and which was then and there plainly labeled as follows:

10 "Compound
Ess Grape

Jos. L. Schider & Co.
93–95 Maiden Lane, New York."

and the said article so contained in the said bottle as aforesaid was then and there an imitation grape essence artificially prepared from alcohol, water, and synthetically produced imitation essential oils, and contained no product of the grape, and contained no added poisonous or deleterious ingredient, and the word "imitation" was not stated on the said bottle; that the said article of food so contained in the said bottle as aforesaid, when delivered for shipment as aforesaid, was then and there misbranded in that the label bore the statement "Compound Ess Grape" regarding the ingredients and substances contained in the said article, which statement was false and misleading in that it indicated that a true grape product was an ingredient and substance contained in the said article, whereas in truth and in fact a true grape product was not an ingredient or substance contained in the said article, but the said article consisted of an imitation grape essence artificially prepared from alcohol, water, and synthetically produced imitation essential oils, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Food and Drugs Act June 30, 1906.)

Sixth count.

11 And the grand jurors aforesaid, on their oath aforesaid, do further present that Joseph L. Schider, trading as "Jos. L. Schider & Co.," late of the city and county of New York, in the district aforesaid heretofore, to wit, on the twenty-fifth day of February, in the year of our Lord one thousand nine hundred and fourteen, at the southern district of New York and within the jurisdiction of this court, did unlawfully deliver to the Old Dominion Steamship Company, a common carrier, for shipment from the city of New York, State of New York, in the district aforesaid, to the Continental Cider Company, in the city of Norfolk, State of Virginia, a certain article of food, contained in a bottle, which said bottle was the package in which the said article was offered for sale, and which was then and there plainly labeled as follows:

"Compound
Ess Grape

Jos. L. Schider & Co.
93–95 Maiden Lane, New York."

and the said article so contained in the said bottle as aforesaid was then and there an imitation grape essence artificially prepared from alcohol, water, and synthetically produced imitation essential oils, and contained no product of the grape, and contained no added poisonous or deleterious ingredient: that the said article of food so contained in the said bottle as aforesaid, when delivered for shipment as aforesaid, was then and there misbranded in that it purported to be a true product of the grape, whereas in truth and in fact it was an

imitation thereof, artificially prepared from alcohol, water, and synthetically produced imitation essential oils, and the word "imitation" was not stated on the said bottle in which the said article was offered for sale, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Food and Drugs Act of June 30, 1906.)

H. SNOWDEN MARSHALL,
U. S. Attorney.

12 (Endorsed): U. S. District Court.—The United States of America—The United States of America vs. Joseph L. Schider, trading as "Joe L. Schider & Co."—Indictment. Adulteration and misbranding of an article of food.—Food & Drugs Act, June 30, 1906.—H. Snowden Marshall, U. S. Attorney.—A true copy, George E. Wood, foreman.—U. S. District Court, S. D. of N. Y., filed Feb. 14, 1917.

1917. Feby. 23. Demurrer filed.

" Feby. 24. Demurrer argued and sustained.

C. W. SESSIONS, D. J.

" Feby. 27. Filed order sustaining demurrer.

13 Demurrer.

Fol. 1. United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,
against
JOSEPH L. SCHIDER, TRADING AS "JOS. L. SCHIDER & Co.," defendant.

The defendant above named hereby demurs to the first count of the indictment on the ground

" 2 I. That the facts therein stated do not constitute a crime.

II. That the labeling,

"Compound
Ess Grape

Jos. L. Schider & Co.
93–95 Maiden Lane, New York."

was no unlawful adulteration, in that it complied with the proviso contained in section 8 of the food and drugs act of 1906, by the use of the word "Compound" in describing said article.

" 3 The defendant above named hereby demurs to the second count of the indictment on the ground

III. That the facts therein stated do not constitute a crime.

IV. That the labeling,

"Compound
Ess Grape

Jos. L. Schider & Co.
93–95 Maiden Lane, New York."

14 was no unlawful adulteration, in that it complied with Fol. 4
the proviso contained in section 8 of the food and drugs act of 1906 by the use of the word "Compound" in describing said article.

The defendant above named hereby demurs to the third count of the indictment on the ground

V. That the facts therein stated do not constitute a crime.

VI. That the statement,

"Compound
Ess Grape

Jos. L. Schider & Co.
93–95 Maiden Lane, New York."

" 5 appearing on the label did not misbrand the said article, because the use of the word "Compound" came within the proviso contained in section 8 of the food and drugs act of 1906, and said indictment on its face shows that said article contained no added poisonous or deleterious ingredient.

VII. That the branding of the said article,

"Compound
Ess Grape

Jos. L. Schider & Co.
93–95 Maiden Lane, New York."

" 6 was a proper branding of said article within the purview of said food and drugs act of 1906.

The defendant above named hereby demurs to the fourth count of said indictment on the ground

VIII. That the facts therein stated do not constitute a crime.

15 Fol. 7 IX. That the statement,

"Compound
Ess Grape

Jos. L. Schider & Co.
93–95 Maiden Lane, New York."

appearing on the label did not misbrand the said article, because the use of the word "Compound" came within the proviso contained in section 8 of the food and drugs act of 1906, and said indictment on its face shows that said article contained no added poisonous or deleterious ingredient.

" 8 X. That the branding of the said article,

"Compound
Ess Grape

Jos. L. Schider & Co.
93–95 Maiden Lane, New York."

was a proper branding of said article within the purview of said food and drugs act of 1906.

The defendant above named hereby demurs to the fifth count of said indictment on the ground

XI. That the facts therein stated do not constitute a crime.

" 9 XII. That the statement,

" Compound
Ess Grape

Jos. L. Schider & Co.
93–95 Maiden Lane, New York."

appearing on the label did not misbrand the said article because the use of the word " Compound " came within the proviso contained in section 8 of the food and drugs act of 1906, and said indictment on its face shows that said article contained no added poisonous or deleterious ingredient.

16 " 10 XIII. That the branding of the said article,

" Compound
Ess Grape

Jos. L. Schider & Co.
93–95 Maiden Lane, New York."

was a proper branding of said article within the purview of said food and drugs act of 1906.

The defendant above named hereby demurs to the sixth count of said indictment on the ground

XIV. That the facts therein stated do not constitute a crime.

" 11 XV. That the statement,

" Compound
Ess Grape

Jos. L. Schider & Co.
93–95 Maiden Lane, New York."

appearing on the label did not misbrand the said article because the use of the word " Compound " came within the proviso contained in section 8 of the food and drugs act of 1906, and said indictment on its face shows that said article contained no added poisonous or deleterious ingredient.

" 12 XVI. That the branding of the said article,

" Compound
Ess Grape

Jos. L. Schider & Co.
93–95 Maiden Lane, New York."

was a proper branding of said article within the purview of said food and drugs act of 1906.

Dated, New York, February 20th, 1917.

JOSEPH S. ROSALSKY,
Attorney for Defendant.

Office & post office address: 346 Broadway, Borough of Manhattan, New York City.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Feb. 23, 1917.

17 Order sustaining demurrer.

At a stated term of the United States District Court for the Southern District of New York, held in and for the said district at the United States courthouse in the post-office building in the Borough of Manhattan, city of New York, on the 27 day of February, 1917.

Present: Hon. Clarence W. Sessions, United States district judge.

UNITED STATES OF AMERICA
against
JOSEPH L. SCHIDER, TRADING AS "JOS. L. SCHIDER & CO.,"
defendant.

The defendant having, on the 23rd day of February, 1917, filed his demurrer herein to the indictment filed herein on the 14th day of February, 1917, and the United States district attorney having thereupon moved the said cause for argument upon the issues of law raised by said demurrer, and said argument having duly come on to be heard before the undersigned, United States district judge for the southern district of New York, on the 24th day of February, 1917, and argument having been had thereon, and after hearing Joseph S. Rosalsky, Esq., in support of said demurrer, and John Fine, Esq., assistant United States attorney, in opposition thereto, and the undersigned having, on the 24th day of February, 1917, given his decision from the bench sustaining said demurrer to counts 1 to 6, inclusive, in the said indictment upon the ground that the case of Weeks v. United States, 224 Federal Reporter, page 64, supporting the contentions of the defendant in this case, is controlling authority in this circuit and upon this court.

18 Now, upon motion of Joseph S. Rosalsky, attorney for the defendant, Joseph L. Schider, it is

Ordered and adjudged that said demurrer to counts 1 to 6, inclusive, in said indictment be, and the same hereby is, sustained on the ground that the indictment herein is insufficient upon any construction of the food and drugs act of June 30, 1906, and the defendant Joseph L. Schider is not required to answer the same.

C. W. SESSIONS,
U. S. District Judge.

Notice of settlement of the above order is hereby waived.
New York, February 26th, 1917.

H. SNOWDEN MARSHALL,
U. S. Attorney.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Feb. 27, 1917.

19 United States District Court for the Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
JOSEPH L. SCHIDER, TRADING AS JOS. L. SCHIDER & CO., defendant in error.
} Petition for writ of error.

The United States of America feeling aggrieved by the order of this court entered herein on the 27th day of February, 1917, sustaining the defendant's demurrer to counts 1 to 6, inclusive, of the indictment herein, comes now by H. Snowden Marshall, its attorney, and petitions said court for an order allowing said United States of America to prosecute a writ of error to the Supreme Court of the United States in accordance with act of Congress approved March 2, 1907, and your petitioner will ever pray.

Dated New York, March 15, 1917.

H. SNOWDEN MARSHALL,
United States Attorney for the Southern District of New York, Attorney for the United States.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Mar. 16, 1917.

20 District Court of the United States for the Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
JOSEPH L. SCHIDER, TRADING AS "JOS. L. SCHIDER & CO.," defendant in error.
} Assignment of errors.

Now comes the above United States of America, by its attorney, H. Snowden Marshall, and files the following assignment of errors upon which it will rely upon his prosecution upon the writ of error sued out by it in the above entitled case to revise the order, made and entered herein on the 27th day of February, 1917, sustaining the demurrer on the ground that the indictment herein is insufficient upon any construction of the food and drugs act of June 30, 1906, as follows:

1. The court erred in sustaining the demurrer to counts 1 to 6, inclusive, of the indictment herein.

2. The court erred in not overruling the demurrer to counts 1 to 6, inclusive, of the indictment herein.

3. The court erred in adjudging that the said indictment was insufficient upon any construction of the food and drugs act of June 30, 1906.

4. The court erred in its construction of the food and drugs act of June 30, 1906.

5. The court erred in its decision sustaining a demurrer to the indictment herein on the ground that the indictment herein was insufficient and basing its decision upon a construction of the food and drugs act of June 30, 1906, upon which said indictment was founded.

21 The United States of America, the plaintiff in error, prays that the orders made and filed herein on the 27th day of February, 1917, sustaining the demurrer to the indictment herein for the errors aforesaid, and for other errors in the record and proceedings herein, may be reversed and altogether held for nothing, and that the said District Court of the United States for the Southern District of New York be directed to vacate and set aside said order and to compel the defendant, the defendant in error, to plead to the indictment herein.

Dated New York, March 15, 1917.

H. SNOWDEN MARSHALL,
United States Attorney in and for the Southern District of New York, Attorney for Plaintiff in Error.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Mar. 16, 1917.

22 By the Hon. Learned Hand, one of the judges of the District Court of the United States for the Southern District of New York, to Joseph L. Schider, trading as "Jos. L. Schider & Co.," greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court, to be holden at the city of Washington, in the District of Columbia, on the 14th day of April, 1917, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Southern District of New York, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the said order mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the city of New York, in the district above named, this 16th day of March, in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States the one hundred and forty-first.

[SEAL.] LEARNED HAND,
Judge of the District Court of the United States for the Southern District of New York.

(Indorsed:) C 9–308. U. S. District Court, Southern District of New York. United States of America, plaintiff in error, versus Joseph L. Schider, trading as "Jos. L. Schider & Co.," defendant in error. Citation. H. Snowden Marshall, United States attorney, attorney for ptf. in error. Due service of a copy of the within is hereby admitted. New York, Mar. 16, 1917. Joseph S. Rosalsky, attorney for deft. in error. To Jos. S. Rosalsky, Esq., attorney for deft. in error. 346 Bway, New York, N. Y.

Filed Mar. 16, 1917. U. S. District Court, S. D. of N. Y.

(Indorsed on cover:) File No. 25890. S. New York, D. C., U. S. Term No. 468. The United States, plaintiff in error, vs. Joseph L. Schider, trading as "Jos. L. Schider & Co." Filed April 7th, 1917. File No. 25890.

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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
JOSEPH L. SCHIDER, TRADING AS "JOS. L. Schider & Co." } No. 468.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and in accordance with the provisions of the Criminal Appeals Act, 34 Stat. 1246, moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

Defendant in error was indicted in the District Court of the United States for the Southern District of New York for adulteration and misbranding of an article of food shipped in interstate commerce and labeled:

"Compound
Ess. Grape,"

when the article, although not containing any poisonous or deleterious ingredients, was an imitation

grape essence artificially prepared and contained no product of the grape, in violation of the so-called "Food and Drugs Act" of June 30, 1906.

A demurrer to the indictment was sustained, the district court following the case of *Weeks* v. *United States*, 224 Fed. 64, and holding in effect that the use of the word "compound" on the label satisfied the requirements of the Food and Drugs Act and that any article of food so labeled can not be said to be adulterated or misbranded unless it appears that some poisonous or deleterious ingredients are contained therein.

The case is of importance to the Department of Agriculture in the administration of the Food and Drugs Act as well as to the Department of Justice in proceeding with prosecutions thereunder. For these reasons an early determination by this court is desirable.

Opposing counsel concur.

JOHN W. DAVIS,
Solicitor General.

DECEMBER, 1917.

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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
JOSEPH L. SCHIDER, TRADING AS "JOS. L. Schider & Co."
No. 468.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This case comes up on a writ of error to the District Court under the Criminal Appeals Act of March 2, 1907 (34 Stat., ch. 2564, p. 1246), to review an order sustaining a demurrer to an indictment, and involves a construction of the Food and Drugs Act of June 30, 1906 (34 Stat., ch. 3915, p. 768), relative to the use of the word "compound" in labeling food products pursuant to subdivision second of the proviso of section 8 of said act.

The indictment charged unlawful delivery for shipment in interstate commerce of a certain article of food labeled:

"Compound
Ess Grape
Jos. L. Schider & Co.
93–95 Maiden Lane, New York."

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The indictment was in six counts, two charging that the article was adulterated, and the remaining four that it was misbranded, within the meaning of the act.

Each count alleged that the article was an imitation grape essence, artificially prepared from alcohol, water, and synthetically produced imitation essential oils, and contained no product of the grape, and that the word "imitation" was not stated on the bottle; and also recited that the article contained no added poisonous or deleterious ingredient. (R., pp. 2–7.)

The first count then charged upon this state of facts that the article was adulterated in that an imitation grape essence "had been wholly substituted for a true grape product, which the article purported to be"; and the second count that an imitation grape essence "had been mixed with the said article so as to reduce and lower and injuriously affect the quality and strength of the said article." (R., p. 3.)

The remaining four counts charged in various forms that the article was misbranded in that it purported to be a true product of the grape, and the words "Ess Grape" and "Compound Ess Grape" contained in the label, and the labeling as a whole, were false and misleading and calculated to deceive the purchaser and cause him to believe the article was a true product of the grape, whereas in truth such article was an imitation grape essence, artificially prepared, and contained no product of the grape. (R., pp. 4–7.)

Defendant in error interposed a demurrer to each and all of the counts upon the ground that (*a*) the facts stated did not constitute a crime, (*b*) the label was not an unlawful adulteration or a misbranding because the use of the word "compound" came within the proviso contained in section 8, and (*c*) that the branding of the article was proper and within the purview of the Food and Drugs Act of 1906. (R., pp. 7–10.)

The lower court sustained the demurrer as to each of the counts "upon the ground that the case of *Weeks* v. *United States*, 224 Federal Reporter, page 64, supporting the contentions of the defendant in this case, is controlling authority in this circuit and upon this court," and in its order stated "the indictment herein is insufficient upon any construction of the Food and Drugs Act of June 30, 1906." (R., p. 10.)

Plaintiff in error thereupon applied for and was granted a writ of error bringing the case here for review. (R., pp. 11–12.)

ASSIGNMENTS OF ERROR.

The following are the assignments of error:

1. The court erred in sustaining the demurrer to counts 1 to 6, inclusive, of the indictment herein.

2. The court erred in not overruling the demurrer to counts 1 to 6, inclusive, of the indictment herein.

3. The court erred in adjudging that the said indictment was insufficient upon any construction of the Food and Drugs Act of June 30, 1906.

4. The court erred in its construction of the Food and Drugs Act of June 30, 1906.

5. The court erred in its decision sustaining a demurrer to the indictment herein on the ground that the indictment herein was insufficient and basing its decision upon a construction of the Food and Drugs Act of June 30, 1906, upon which said indictment was founded. (R., pp. 11–12.)

THE STATUTE.

The pertinent provisions of the statute are as follows:

> Sec. 7. That for the purposes of this Act an article shall be deemed to be adulterated:
>
> * * * * *
>
> In the case of food:
>
> First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.
>
> Second. If any substance has been substituted wholly or in part for the article.
>
> * * * * *
>
> Sec. 8. That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this Act an article shall also be deemed to be misbranded:

* * * * *

In the case of food:

First. If it be an imitation of or offered for sale under the distinctive name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser, * * *.

* * * * *

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

* * * * *

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale: * * *. (34 Stat., c. 3915, pp. 768, 770–771.)

QUESTION PRESENTED.

The question here presented is, may an artificially prepared imitation article, containing no product of the grape, be labeled and marketed as a compound

essence of grape and yet escape the inhibitions of the act as to adulteration and misbranding merely because the word "compound" appears on the label.

ARGUMENT.

I.

THE ALLEGATIONS OF THE INDICTMENT SHOW ADULTERATION AND MISBRANDING WITHIN THE PROHIBITIONS OF THE ACT.

Each count contains averments of fact showing the delivery for shipment in interstate commerce by defendant in error of an article so labeled as to purport to be an essence of grape, whereas, it is averred, the article was, in fact, an artificial imitation thereof, containing no product of the grape, and not labeled "imitation."

The first two counts thereupon charge adulteration in that an imitation grape essence was wholly substituted for the true product which the article purported to be, and that an imitation grape essence had been mixed with the article so as to reduce and lower and injuriously affect the quality and strength of the said article.

An article of "food" is to be deemed to be "adulterated" within the meaning of the act (*a*) "if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength" (Sec. 7, subd. First, in the case of food), or (*b*) "if any substance has been substituted wholly or in part for the article" (Sec. 7, subd. Second, in the case of food).

The remaining four counts charge that the article was labeled and branded so as to mislead and deceive the purchaser, and that the name "Ess Grape," or "Compound Ess Grape," denoted a true product of the grape, while the article thus labeled was in fact an imitation, and such label was, therefore, false and misleading, and the article misbranded.

The act provides that the term "misbranded" applies to any article the label of which contains any statement, etc., which shall be false or misleading in any particular (Sec. 8); and that an article of food shall be deemed to be "misbranded" for the purposes of the act (*a*) "if it be an imitation of * * * another article" (Sec. 8, subd. First, in the case of food), (*b*) "if it be labeled or branded so as to deceive or mislead the purchaser" (Sec. 8, subd. Second, in the case of food), or (*c*) "if the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular" (Sec. 8, subd. Fourth, in the case of food).

There can be no doubt from the foregoing that the indictment is sufficient as charging the offenses both of adulteration and misbranding under the general prohibitions of the statute. The alleged violations are charged in the identical words of the statute, while the facts averred therein clearly warrant the charges.

But the demurrer of defendant in error is based upon the idea that the use of the word "compound"

on the label of this imitation article brought such label within the proviso of section 8 and made it immune to the prohibitions of the statute.

II.

THE PROVISO RELIED UPON DOES NOT AUTHORIZE THE USE OF A MISLEADING LABEL ON AN IMITATION ARTICLE MERELY BECAUSE THE WORD "COMPOUND" APPEARS UPON SUCH LABEL.

The act deals specifically with imitations of food products, declaring that an article shall be deemed to be misbranded "if it be an imitation of * * * another article." (Sec. 8, subd. First, in the case of food.)

The manner in which an imitation may be marketed is prescribed in the proviso of section 8, subd. Second, viz., if "the word * * * imitation * * * is plainly stated on the package in which it is offered for sale."

The claim that it is unnecessary to label an imitation as such if it be a compounded product and is labeled "compound" is based upon a construction of the proviso from which the foregoing excerpt is taken, which reads:

> *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:
>
> * * * * *
>
> Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or

> blends, and the word "compound," "imitation," or "blend," *as the case may be,* is plainly stated on the package in which it is offered for sale * * *. (Italics ours.) (Sec. 8, subd. Fourth, in the case of food.)

1. Such Construction is not Warranted by the Language of the Statute.

The passage quoted seems to be quite clear and the intent of Congress plainly indicated. Three separate and distinct classes of articles are specified. The only possibility of confusion as to the word which should be used for purposes of labeling in any given instance was foreseen by the draftsmen and safeguarded by the following definition of the word "blend":

> *Provided*, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only. (Sec. 8, subd. Second of "Fourth" subd. in the case of food.)

This definition undoubtedly was inserted to prevent confusion in the use of the words "compound" and "blend" and shows that Congress intended that each of these terms should at all times be used accurately and according to its own meaning in labeling articles of food. Furthermore, additional evidence of this intention is found in the use of the clause "as the case may be," italicised in the proviso as quoted above. It is provided, in effect, that a food product which contains no added deleterious ingredient shall

not be deemed to be adulterated or misbranded (1) if the article is marked so as to plainly indicate that it is in fact a compound, or is an imitation, or is a blend, and (2) if the word "compound," "imitation," or "blend," "*as the case may be*, is plainly stated on the package."

Manifestly, therefore, a compound must be labeled "compound," an imitation labeled "imitation," and a blend labeled "blend." But if an article is an imitation it must be labeled as such, even though it may be compounded of various ingredients and consequently also, in a sense, is a compound as well as an imitation. The use of the term "compound" only when the article is also an imitation is not sufficient and is deceptive and misleading, contrary to the intent and purpose of the act.

The view that the term "imitation" is applicable to a compound as well as to a simple product is fully sustained by the application of the term as contained in the rules and regulations for the enforcement of the act, adopted by virtue of authority conferred in section 3 thereof, as follows:

> *Regulation 21. Compounds, Imitations, or Blends Without Distinctive Name.*
>
> * * * * * *
>
> (*f*) The term "imitation" applies to any mixture or compound which is a counterfeit or fraudulent simulation of any article of food or drug.

It is not here contended, of course, that such a regulation would change either the intent or the

meaning of the act. Such regulations, however, promulgated by those charged by the terms of the act itself with making rules for its enforcement, may very properly be looked to for assistance in interpreting the language therein used.

Consequently, an artificially prepared imitation of a grape essence, containing no product of the grape but labeled essence of grape, and it not appearing that it is an imitation, is misbranded just as truly with the word "compound" on the label as it would be if such word were not used thereon.

A decision in line with the Government's contention here was rendered by the Circuit Court of Appeals for the Sixth Circuit in the case of *Frank* v. *United States*, 192 Fed. 864, wherein the article dealt with contained 65 per cent white pepper and 35 per cent corn product, and was labeled "Perfection Mills Compound White Pepper." It was sought in that case to bring the label within the proviso here involved because the word "compound" appeared thereon, but the court took the view that the term "compound" was used in a misleading manner, and that therefore defendant was not relieved of the charge of misbranding.

A contrary view as to the import of the language of this proviso was taken by the Circuit Court of Appeals for the Second Circuit in the case of *Weeks* v. *United States*, 224 Fed. 64, regarding an article labeled "Fruit Wild Cherry Compound," but which contained no fruit wild cherry. It was this decision

which the lower court felt compelled to follow in the instant case, referring to it as "controlling authority in this circuit and upon this court." It will be observed, however, that the court in deciding the *Weeks* case was content merely to announce its conclusion as to the interpretation of the proviso and did not indulge in any discussion which would indicate the process of reasoning by which such conclusion was reached. (In *Weeks* v. *United States*, No. 109, October Term, 1917, decided February 4, 1918, wherein the judgment of the Circuit Court of Appeals in favor of the Government was affirmed, this court dealt with a case which was consolidated and tried with the foregoing one, but which involved a different article and other issues, so that the ruling above referred to was not involved in the hearing here.)

But if, in any view, the proviso were susceptible of this broad construction its adoption would violate the settled rule that such a proviso shall be narrowly construed.

This court, speaking through Mr. Justice Story, in *United States* v. *Dickson*, 15 Pet., 141, 165, said:

> * * * we are led to the general rule of law, which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly

> within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reasons thereof.

See, also, *Spokane & Inland Empire R. R. Co.* v. *United States*, 241 U. S. 344, 350, and *The Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 244 U. S. 336.

Defendant in error seeks to avail himself of the proviso as an exception to the other provisions of the statute. He must, therefore, under the foregoing rule, show unmistakably that he is within both its letter and spirit.

2. The Construction Contended for by Defendant in Error would be Subversive of the Intent and Purpose of the Act.

One of the main purposes of the statute is to prevent the deception of purchasers.

> The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality. (*United States* v. *Lexington Mills Co.*, 232 U. S. 399, 409, as quoted in *United States* v. *Coca Cola Co.*, 241 U. S. 265, 277.)
>
> The purpose of the act is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it. (*United States* v. *Antikamnia Co.*, 231 U. S. 654, 665.)

The interpretation placed upon the proviso by defendant in error would permit the marketing of any sort of combination of substances under any label the manufacturer might choose, so long as he placed the word "compound" thereon and added no deleterious substance. Under this construction of the proviso a label apparently descriptive of an article need serve no purpose save that of deception. A purchaser might, with impunity, be led to believe that he was getting a compound of a certain nature when in fact the article would be purely an imitation. Such a result, naturally following the construction that a compounded imitation need not under the proviso be so branded, would not only conflict with the general inhibitions of the statute against deception but would also be directly contrary to the specific provisions contained in section 8, above quoted, to the effect that if an article is an imitation, it will be deemed to be misbranded.

It is common knowledge that a vast number of imitations are compounded of various ingredients. Indeed, it is difficult to call to mind any imitation article which is not in some measure a compound. Yet if the contention of defendant in error were adopted, it would be wholly unnecessary to apprise the public of the fact that any one of such numerous class of articles was an imitation.

The record here furnishes a striking example of what such an interpretation leads to. "Compound Ess Grape" would reasonably lead the purchaser to believe that the product was a concentrated or

strengthened essence of the grape (*Frank* v. *United States, supra*, p. 869), or, at the very least, would convey the idea that it contained some product of the grape. But the indictment specifically charges that the article is merely an imitation and contains no such product. To paraphrase the language of this court in dealing with the claim that a combination of two descriptive names constituted a distinctive name and was not, therefore, misleading within the act, the contention here "would permit a manufacturer, who could not use the name chocolate to describe that which was not chocolate, or vanilla to describe that which was not vanilla, to designate a mixture as 'Chocolate-Vanilla,' although it was destitute of either or both, provided" the word *compound* was added thereto. *United States* v. *Coca Cola Co.*, 241 U. S. 265, 289.

Obviously the adoption of the construction of the proviso advocated by defendant in error would open the door to a numerous class of palpable frauds which the statute was clearly designed to prevent.

CONCLUSION.

The judgment of the lower court should be reversed and the case remanded with directions to enter an order overruling the demurrer.

Respectfully,

WILLIAM L. FRIERSON,
Assistant Attorney General.

CHAS. S. COFFEY,
Attorney.

FEBRUARY, 1918.

○

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1917.

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

JOSEPH L. SCHIDER, TRADING AS "JOS. L. SCHIDER & CO." } No. 468

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

We adopt the statement of the case and the pertinent provisions of the statute as set forth in the brief of the plaintiff in error. But we state somewhat differently the

QUESTION PRESENTED.

"Compound
Ess Grape Is an article plainly labeled on the bottle, being an imitation grape essence which contains no added poisonous or deleterious ingredient, denounced as an unlawful adulteration and misbranding of an article of food within the proviso (second clause) of section 8 of the Food and Drugs Act of June 30, 1906.

ARGUMENT.

I.

LAWS WHICH CREATE CRIME OUGHT TO BE SO EXPLICIT THAT ALL MEN SUBJECT TO THEIR PENALTIES MAY KNOW WHAT ACTS IT IS THEIR DUTY TO AVOID.

United States v. *Sharp*, Pet. C. C. 118.

Before a man can be punished, his case must be plainly and unmistakably within the statute.

United States v. *Brewer*, 139 U. S. 278.
United States v. *Lacher*, 134 *id.* 624, 628.

A demurrer does not admit that the construction of a statute set forth in the pleading demurred to is the correct one, or that the statute imposes the obligations or confers the rights which the pleading alleges.

Pennie v. *Reis*, 132 U. S. 464.

It admits only the facts alleged which are well pleaded, and not the conclusions of law stated.

Gould v. *Evansville & C. R. R. Co.*, 91 U. S. 526.
United States v. *Van Auken*, 96 *id.* 366.
United States v. *Ames*, 99 *id.* 35.

Adulteration or misbranding of articles of food was not an offense or the subject of criminal prosecution at common law. Such an offense is purely the creation of the statute. Being in derogation of the common law, the statute must be explicit in terms and must be strictly construed.

So considered,

II.

THE FACTS STATED IN THE INDICTMENT DO NOT SHOW AN UNLAWFUL ADULTERATION AND MISBRANDING WITHIN THE PROHIBITIONS OF THE ACT.

The indictment charges that the article of food was contained in a bottle "plainly labeled as follows:

"Compound
Ess Grape

Jos. L. Schider & Co.,
93-95 Maiden Lane, New York." (R., p. 2.)

Attention is here distinctly called to the fact plainly stated (1) that the article is a "compound." (2) that it is: "Ess Grape" or an essence of grape. We think the description so given conveys to the mind of the average reader the impression that the article is not "a true product of the grape," but a compound or mixture.

A purchaser of ordinary prudence could not reasonably be misled or deceived in reading the label.

See United States v. 779 *Cases of Molasses*, 174 Fed. 325 (C. C. A., 8th Cir.).

The indictment admits that the article in question contained no added poisonous or deleterious ingredient, and that it was a grape essence, but refines upon this expression to call it an "imitation" grape essence. It charges

that the article was "unlawfully adulterated in that an imitation grape essence artificially prepared from alcohol, water, and synthetically produced imitation oils had been wholly substituted for a true grape product, which the article purported to be." (R., p. 3.)

The latter allegation, and the statement that the product is an "imitation," we submit, are nothing more nor less than legal conclusions. No facts are stated to negative the truth of the label and the averment fails to state sufficient facts to constitute a violation of law.

Nave-M'Cord Mercantile Co. v. *United States*, 182 Fed. 46 (C. C. A., 8th Cir.).

Broadly speaking, a compound is "anything that is a combination of two or more elements, ingredients or parts; a compound substance." (Standard Dictionary.) An essence of an article is not the original article itself, but rather something which partakes of the nature of that article.

> "Essence" is variously defined as "The sum of the parts or elements that make up the nature of a thing or class"; as "being or existence in the abstract"; "the sum of the generic and specific elements of a thing or class of things"; in pharmacopia (1) A solution of an essential oil or of a volatile principle in alcohol; (2) that separated constituent of a plant, as an oil, upon which it depends for its characteristic quality." And in chemicals as "(5) the combination of elements or radicals in such proportions as to form compounds; said specifically of the preparation by artificial means of such compounds as prior to 1828 were regarded as solely the product of natural

processes as alizarin, and indigo, formerly obtained only from plants, are now made by synthesis from coal tar."

"Synthesis" is defined as "the putting of different things together; the combination of separate substances, elements or subordinate parts into a new form; composition, construction." (Standard Dictionary.)

Nor does the indictment, as we read it, set forth any fact to show that the article was "labeled or branded so as to deceive or mislead the purchaser" (Sec. 8, subd. Second, in the case of food), or that the statement, design, or device regarding the ingredients or the substances contained therein, are "false or misleading in any particular" (Sec. 8, subd. Fourth, in the case of food).

Plaintiff in error next urges that the proviso relied upon does not authorize the use of a misleading label on an imitation article merely because the word "Compound" appears upon such label. We cannot grant the premise so taken. It assumes the existence both of a "misleading label" and of an "imitation article" which we do not regard as facts well pleaded, but merely as bald conclusions of the one who framed the indictment.

In *United States* v. *American Druggists' Syndicate*, 186 Fed. 387, the Food and Drugs Act of 1906 was construed in relation to "Peroxide Cream." VEEDER, J., said in part (at p. 388):

> "Having regard to the fact, however, that the general definition of the term 'misbranded' is expressly applicable to both food and drugs, it does not appear that the difference in phraseology and

form of the arrangement of the specific provisions for the two articles affects their substantial equality in scope. It is clear that the section does not apply to any statement regarding a drug which does not have reference to the ingredients or substances contained therein, or to any of the particulars specified in the section in the case of drugs. The same process of reasoning discloses the scope of the phrase 'false or misleading in any particular.' If there is any appreciable difference in the import of the words false and misleading, the scope of the latter term is to be found in the specific provisions of this section in the case of drugs, for instance, where the label fails to state, as required, the quantity or proportion of alcohol contained therein. No statement regarding a drug can therefore be false or misleading in any particular within the meaning of the act, unless it relates to some one or more of the various particulars expressly enjoined or prohibited by the act.

It appears upon the face of the information that the preparation in question contains some peroxide. There was no statement on the label as to the quantity or proportion, nor does the act require any such statement in the case of peroxide. Certainly, then, the label was not false.

In re Wilson, (*C. C.*) 168 Fed. 566.
United States v. *Boeckmann,* (C. C.) 176 Fed. 382."

We maintain that if the article of food was a grape essence, albeit the indictment chooses to call it an "imi-

tation grape essence," yet being prominently labeled as a "compound," this case under the terms of the proviso, does not come "plainly and unmistakably within the statute."

III.

THERE IS NOTHING TO PREVENT THE COMBINATION OF SUBSTANCES FORMING A GRAPE ESSENCE, AND THE STATUTE DOES NOT REQUIRE THE INGREDIENTS OF THE COMPOUND TO BE STATED ON THE LABEL.

Plaintiff in error contends that the proviso in sec. 8, subd. Fourth, in the case of food, should be construed as providing, in effect, that a food product which contains no added deleterious ingredient shall not be deemed to be adulterated or misbranded (1) if the article is marked so as to plainly indicate that it is in fact a compound, or is an imitation, or is a blend, and (2) if the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package. And that a compound must be labeled "compound," an imitation labeled "imitation," and a blend labeled "blend." (Brief U. S., pp. 9-10.)

The difficulty with this contention is that no such distinctive separation has been attempted in the Act. To accomplish that purpose, it seems to us, resort should be had to the Congress, and not to the courts.

Frank v. *United States*, 192 Fed. 864, (C. C. A. 6th Cir., decided Dec. 5, 1911) is the only case cited as being in line with the Government's contention. KNAPPEN, C. J., there said (at pp. 869, 870):

> "A primary label 'White Pepper Compound' would doubtless fairly indicate that the article is

> a compound of white pepper and some other ingredient, whether another kind of pepper or an unlike substance, it is not now necessary to decide. But the term 'Compound White Pepper' does not, in our opinion, necessarily import the same idea as 'White Pepper Compound.' The adjective 'compound,' we think, is sometimes used colloquially, as meaning 'having added strength,' as a 'compound extract.' However this may be, it seems clear that the term 'Compound White Pepper' does not so naturally imply, to the average purchaser, a mixture of white pepper with an ingredient other than pepper as to make it a proper branding, as against the fact (as alleged) that the statement of the ingredients is so placed and in such type as not to be readily noticed by the purchaser, and as to be calculated and intended to deceive, and mislead the latter. *While we have found no controlling authority in specific support of this view, we have found nothing persuasive to the contrary.*" (Italics ours.)

It will thus be seen that the Court laid particular stress on the fact that the word "Compound" in the label when used as an adjective forming part of one expression would not have the same meaning as if it were used as a noun. It intimated that had the word "compound" been employed as a noun, the decision might have been different. But even the conclusion reached, was arrived at because the court deemed it necessary to say that it found no controlling authority in specific support of its view, and nothing persuasive to the contrary.

In the instant case the word "Compound" stands out in prominent letters by itself. It was used as a subject or heading, thus plainly emphasizing the difference between a true product and a substitute article. To further illustrate this fact, on another and lower line the words "Ess Grape" appear, again noting that an essence of a product, and not the product itself, was referred to. These elements are persuasive to differentiate the Frank Case. There is no requirement in the act for a statement of the ingredients of the article. What was here stated on the label, so far as so stated, is not shown to be "false or mis leading in any particular."

The Government admits that a persuasive authority to the contrary, is *Weeks* v. *United States,* 224 Fed. 64, (C. C. A. 2nd C., decided May 13, 1915), regarding an article labeled "Fruit Wild Cherry Compound," but which contained no fruit Wild Cherry. The Government remarks (brief U. S., p. 12):

> "It will be observed, however, that the court in deciding the Weeks case was content merely to announce its conclusion as to the interpretation of the proviso and did not indulge in any discussion which would indicate the process of reasoning by which such conclusion was reached."

In the Weeks Case, the Court indicated its reasons in an opinion by LACOMBE, C. J., (at p. 67):

> "But the act contains an important proviso, apparently tacked onto the bill to protect various combinations on the market at the time. In order to appreciate the full force of this proviso, which concludes section 8, it is here quoted: * * *

> Now there is not a scintilla of evidence in the case to show that defendant's article contains 'any added poisonous or deleterious ingredients'; therefore it is covered by the proviso (second clause), *because it is labeled to plainly indicate that it is a compound, and the word "compound" is plainly stated on the package. In consequence it cannot, under the proviso, be deemed to be misbranded.* (Italics ours.)

In disposing of the charge of adulteration, the Court said (at p. 67):

> "In the second information the charge is brought under section 7 of the act, which enumerates the conditions which will constitute adulteration of an article for the purposes of the act. The charge is that 'Fruit Wild Cherry Compound' was adulterated, in that it was 'artificially colored with a coal tar dye in such a manner as to simulate a true fruit wild cherry and in a manner whereby its inferiority was concealed.' Section 7 contains this clause:
>
> 'Fourth. If it be mixed, colored, powdered, coated or stained in a manner whereby damage or inferiority is concealed.'
>
> The shipment is the same as that covered by the first information. The label is the same 'Fruit Wild Cherry Compound.' Manifestly the label does not state that the article is 'Fruit Wild Cherry,' but only that it is a *compound*, which contains fruit wild cherry. * * * Under ordinary rules of construction the operation of the proviso might be restricted to the section in which it appears, and it might be held not to qualify section

7, which defines 'adulterations.' * * * But the draftsman of the act has been careful not thus to restrict it, because the proviso begins:

'That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be *adulterated or misbranded* in the following cases.'

Then follows the enumeration above set forth. The article in question is an article of food, and the information does not charge, nor does the testimony show, that there have been added to the compound 'poisonous or deleterious ingredients.' The proviso, therefore, requires a reversal of the conviction under this count."

The Government, it seems to us, would alter the phraseology of the statute and proviso so as to read "If the article is an imitation of another article," it is misbranded. It is sufficient if the label, such as it is, be truthful. Nor does the indictment charge as a fact that the "Compound Ess Grape" was an "imitation" article. It was a different, a new, a special product, and not an imitation of something else. It was prepared not to imitate a product, but to take the place of other products, which also gave to substances the nature of grape, a compound of an essence of grape.

The process of reasoning which the learned attorney for the plaintiff in error finds wanting in the Weeks Case, *supra*, is well supplied by the record in that case of the United States Circuit Court of Appeals for the Second Circuit, on error to the Circuit Court of the United States for the Southern District of New York. The Frank Case, *supra*, was there carefully considered. In sustaining the

demurrer to the first count in the Court below, MAYER, D. J., in his opinion, said (fols. 53-60 of the record in that case):

> "In the first count the information states that the article of food was labeled as follows:
>
> 'Fruit Wild Cherry Compound. Guaranteed to contain no Ether or Chloroform. From O. J. Weeks & Co. Specialties for Manufacturing Bakers, Confectioners and Ice Cream Makers, New York, N. Y., U. S. Serial Number 2049.'
>
> 'Guaranteed under the Food and Drugs Act, June 30, 1906,' and being so labeled was adulterated in that a substance, to wit: An imitation wild cherry essence had been mixed and packed with the article of food purporting to be fruit wild cherry compound so as to reduce and lower and injuriously affect the quality and strength of the article.
>
> It is further stated that the article is adulterated in that an imitation wild cherry essence had been substituted in part for the genuine article, fruit wild cherry, which the article purports to be, and further that the article is adulterated in that it has been colored in a manner whereby inferiority is concealed.
>
> Briefly, the information attacks the propriety of the label.
>
> *It is obvious from reading the label that there is no suggestion that the article purports to consist wholly of fruit wild cherry. The very phraseology negatives any such suggestion.* (Italics ours.)

In this connection it may be well to comment on *Frank* v. *United States*, 192 Fed. Rep., at page 869, cited by the Government. There it will be noted that the article was called 'Compound White Pepper.' The Court said:

"A primary label 'White Pepper Compound' would doubtless fairly indicate that the article is a compound of white pepper and some other ingredient * * *."

Then the Court goes on to say that the term "Compound White Pepper" does not necessarily import the same idea as "White Pepper Compound" and calls attention to the fact that the adjective "compound" is sometimes used colloquially as meaning "having added strength."

But the word "compound" in the case at bar as in the phrase "White Pepper Compound" is a noun and indicates that the fruit wild cherry is in composition or combination with something else. A good many dictionary definitions will be found and it is necessary only to cite one which is concise and clearly stated: "That which is compound or compounded; anything that is a combination of two or more elements, ingredients or parts, a compound substance." (Standard Dictionary.)

Assuming that the article does not contain any added poisonous or deleterious ingredients, there is nothing to prevent the combination of fruit wild cherry with an imitation wild cherry essence, and it is obvious that the purchaser is at once notified by the title that the article in question does not consist wholly of fruit wild cherry, but that fruit

wild cherry is only one of the ingredients in combination with other ingredients.

> *"The Government asks me to hold that the ingredients of the compound must be stated on the package. I find no warrant in the statute for any such holding. The statute was carefully drawn after extended discussion and certainly if Congress had intended that the ingredients of a compound should be set forth upon the label, the statute would have so stated."* (Italics ours.)

It is next urged by the Government that if the proviso were suceptible of the construction adopted here, it "would violate the settled rule that such a proviso shall be narrowly construed." (Brief, p. 12.) We cannot agree in that contention.

> *"The office of a proviso is, generally, to except something from the enacting clause, or to restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview."*
>
> *Minis* v. *United States*, 15 Pet. 423.
> *Boon* v. *Juliet*, 1 Scammon's, Ill. R. 258.

It was held by all the barons of the Exchequer that where the proviso of an act of Parliament was directly repugnant to the purview of it, the proviso should stand, and be held a repeal of the purview, because it speaks the last intention of the lawgiver. It was compared to a will, in which the latter part, if inconsistent with the former, supersedes and revokes it.

The Attorney-General v. *The Governor and County of Chelsea Water Works,* Fitz. R., 195.

In *Savings Institution* v. *Makin,* 23 Me. R. 360, it was held, that a saving clause in a statute, in the form of a proviso, restricting in certain cases the operation of the general language of the enacting clause, was not void, though the proviso be repugnant to the general language of the enacting clause. The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause and proviso, taken and construed together should prevail. If the principal object of the act can be accomplished and stand, under the restriction of the saving clause or proviso, the same is not to be held void for repugnancy.

Finally, the Government contends that the construction contended for by defendant in error would be subversive of the intent and purpose of the act. We answer that the act, being highly penal in its nature, is not to be extended by implication or judicial construction. Since the decision of the Weeks Case (May 13, 1915), our citizens have acted on the faith of that authority. If any change in the law is deemed desirable, then the remedy lies with the Congress, and not with the courts.

CONCLUSION.

The judgment of the lower court was right and should be affirmed.

Respectfully,

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